Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [06/15/88]

CASE NBR: [87106422] [CSY] CASE STATUS: [ ]
SHORT TITLE: [Lewis, Robert L. ]
VERSUS [Florida ] DATE DOCKETED: [02/1/88]

PAGE: [01]

| DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|
| Feb 11 1988 | | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| Mar 17 1988 | | DISTRIBUTED. April 1, 1988 |
| Mar 30 1988 | | Response requested. (Due April 29, 1988) |
| Apr 21 1988 | | Brief of respondent Florida in opposition filed. |
| Apr 28 1988 | | REDISTRIBUTED. May 12, 1988 |
| May 16 1988 | | REDISTRIBUTED. May 19, 1988 |
| May 23 1988 | | REDISTRIBUTED. May 26, 1988 |
| May 31 1988 | | Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) |

**********

No. 87-6422



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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ROBERT LEE LEWIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

# PETITION FOR WRIT OF CERTIORARI

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

## QUESTION PRESENTED

Did the police action of confronting the petitioner with evidence of his crime while he was in custody and after he had invoked his right to remain silent constitute the functional equivalent of interrogation in violation of petitioner's Fifth Amendment protections against compelled self-incrimination?



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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ROBERT LEE LEWIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

Petitioner, ROBERT LEE LEWIS, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Fourth District, entered on July 8, 1987. Petitioner's timely filed motion for rehearing was denied on August 11, 1987. Petitioner timely sought discretionary review of the decision of the district court in the Supreme Court of Florida which declined to accept jurisdiction in an order dated December 14, 1987.

### CITATION TO THE OPINION BELOW

The decision of the District Court of Appeal, Fourth District, in this cause appears as Lewis v. State, 509 So.2d 1236 (Fla. 4th DCA 1987), and is set out at pages 1 and 2 of the Appendix of this petition. The order of the district court denying rehearing is contained in the Appendix at page 3. The decision of the Florida Supreme Court denying discretionary review is not yet reported and is contained in the Appendix at page 4.

### JURISDICTION

The District Court of Appeal, Fourth District, entered its opinion on July 8, 1987, denied rehearing on August 11, 1987, and the Supreme Court of Florida declined to accept jurisdiction to review the case on December 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States, specifically that portion of the Fifth Amendment that provides that no person "shall be compelled in any criminal case to be a witness against himself" as made applicable to the states through the Fourteenth Amendment.

## STATEMENT OF THE CASE

Petitioner, ROBERT LEE LEWIS, was convicted of attempted first degree murder, robbery with a firearm and shooting into an occupied building arising out of a robbery of Bobby Lee Walker, a Shell gas station attendant, on December 6, 1985. After petitioner was arrested and given his Miranda[1] warnings by Detective O'Connor, he invoked his right to remain silent but did not request the presence of an attorney. Immediately thereafter, Detective O'Connor instructed Officer Curcio to take petitioner to an evidence room where he was shown a video tape of the robbery and shooting of Mr. Walker. While viewing the video tape, the petitioner said to Officer Curcio: "Man, he took it like a man. I should have hit him a couple more times."

Petitioner timely appealed to the District Court of Appeal, Fourth District, contending reversible error in the failure to grant his motion to suppress incriminating statements while he was in custody. On appeal, the District Court of Appeal, Fourth District, held that confronting petitioner with incriminating evidence is not the "functional equivalent" of express questioning within the meaning of Rhode Island v. Innis, 446 U.S. 291 (1980), even though the Court also observed that "the police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response." (Appendix - 2). The court concluded that from the petitioner's perspective such police procedure did not impinge upon petitioner's will in a coercive manner because petitioner was no novice to the

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1 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).



criminal justice system, had a long and serious felony record, was familiar with police procedures and tactics and laughed while watching the video tape. Lewis v. State, supra (Appendix -2).

Petitioner timely filed his motion for rehearing on July 23, 1987, which was denied on August 11, 1987 (Appendix - 3). Petitioner then timely sought discretionary review in the Supreme Court of Florida which declined to review petitioner's case on December 14, 1987, Justices Barkett and Kogan dissenting (Appendix - 4). Petitioner now seeks review in this Court.

## REASONS FOR GRANTING THE WRIT

The District Court of Appeal, Fourth District of Florida formulated a novel legal principle in petitioner's case that the police cannot interrogate a laughing suspect. In prior opinions under the rationale of Rhode Island v. Innis, 446 U.S. 291 (1980), federal appellate courts and state courts of last resort have recognized that the police practice of confronting an accused with evidence of his crime while he is in custody and after he has invoked his right to remain silent has only one possible objective - to elicit a statement from him. Comos v. Wingo, 465 F.2d 96,99 (6th Cir. 1972); United States v. Barnes, 432 F.2d 89 (9th Cir. 1970); People v. Ferro, 472 N.E.2d 13, (N.Y. 1984); Koza v. State, 718 P.2d 671 (Nev. 1986); Wainwright v. State, 504 A.2d 1096 (Del. 1986); State v. Quinn, 498 A.2d 676 (M.D. App. 1985). This Court should grant the writ to decide whether a police officer's communications about the evidence against a defendant is the "functional equivalent of interrogation" and thus a prohibited, coercive response under Rhode Island v. Innis to a recalcitrant arrestee's invocation of his Fifth Amendment right to remain silent.

In Innis, the Court made clear that interrogation under Miranda refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response. 446 U.S. at 301. Because "the latter portion of this definition focuses primarily upon the perceptions of the suspect, rather

than the intent of the police" (id.), the question is not what was the subjective intent of the police but rather what words or actions, in light of their knowledge concerning the suspect, the police "should have known were reasonably likely to elicit an incriminating response."

In petitioner's case, the district court recognized that tne "police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response." Lewis v. State, at 1237. But such obvious knowledge on the part of the police to participate in the functional equivalent of interrogation was constitutionally legitimized in petitioner's case because petitioner had a prior criminal record, prior contact and knowledge of police techniques and because he laughed. Under the district court's opinion, the objective test of Rhode Island v. Innis, to determine whether a practice is interrogation may be avoided completely when police deal with hardened criminals or suspects who display an attitude of arrogance or show nervous or embarrassed laughter or other inappropriate emotional response. In effect, the court concludes that when a suspect ought to be savvy enough to see through a psychological ploy or coercive influence of a police tactic, that he has not been subjected to what everyone else knows is interrogation. It is clear that the District Court of Appeal, Fourth District of Florida has misconstrued this Court's clarification of the test of Rhode Island v. Innis as set forth in Arizona v. Mauro, ___ U.S. ___, 107 S.Ct. 1931 (1987).

This case presents the question whether the practice of detailing the evidence against the defendant who has invoked her right to remain silent goes beyond the necessities of arrest and booking; in Koza v. State, 718 P.2d 671 (Nev. 1986), such a police technique was called "interrogation" within the meaning of Rhode Island v. Innis. Delaware also regards police initiated conversation to describe the state's evidence against the accused



during the booking process as a gratuitous and totally unnecessary tactic which is reasonably calculated to elicit a reaction and an incriminating statement from the defendant, Wainwright v. State, 504 A.2d 1096 (Del. 1986).

Maryland courts also regard police officer's communications about the evidence against the defendant as interrogation, an attempt to manipulate the mental process of the arrestee to psych him into changing his mind about invoking his Fifth Amendment right to remain silent or to request the presence of counsel during interrogation. State v. Quinn, 498 A.2d 676 (1985). Placing stolen furs from the murder victim's residence in front of the jail cell of a defendant who had invoked his right to silence was found to constitute the functional equivalent of interrogation even though no words were spoken by the police officer in People v. Ferro, 472 N.E.2d 13 (N.Y. 1984).

A significant constitutional question on the extent of Miranda's safeguards is presented in this case. Is confronting the defendant with evidence against him normally attendant to arrest and custody or does it taunt him to deny, explain or confess to the significance of the evidence? This important question of constitutional law should be decided by this Court before confusion and controversy over this Court's decision in Arizona v. Mauro grows.

There is some authority from federal appellate courts that the interrogator may show the accused the evidence against him and then ask him whether he has reconsidered his decision to remain silent. United States v. Pheaster, 544 F.2d 353,366-68 (9th Cir. 1976); United States v. Hodge, 487 F.2d 945,946-47 (5th Cir. 1973). But, after the definition of "interrogation" in Innis, the officers should have known that showing petitioner the video of the crime being committed would likely elicit an incriminating response. Petitioner's incriminating statement was the intended and not the unforseeable result of the officer's action of confronting petitioner with the video.

The decisions of the federal courts of appeal are in conflict on this question of law. Other state courts of last resort have decided this legal question contrary to the manner decided by the District Court of Appeal, Fourth District of Florida and some of the federal circuit courts. The law on this constitutional question of whether it constitutes impermissible interrogation to immediately confront the accused with evidence against him after he has invoked his right to remain silent is one which should be settled by the Court to maintain uniform application of an accused's rights under the Fifth Amendment. The writ should be granted to determine whether petitioner's incriminating statement was secured in violation of his Fifth Amendment rights or whether this police practice is one which may be constitutionally employed.



## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

ROBERT LEE LEWIS

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

# A P P E N D I X

RICHARD L. JORDANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
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9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

INDEX TO APPENDIX

of 60 days or entry of a new injunction, whichever occurs first.

LETTS, DELL and STONE, JJ., concur.

**Robert Lee LEWIS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 4-86-0913.**

District Court of Appeal of Florida, Fourth District.

July 8, 1987.

Rehearing Denied Aug. 11, 1987.

Defendant was convicted for attempted murder in the first degree, robbery with use of a firearm, and shooting into an occupied building, in the Circuit Court, Broward County, Mark A. Speiser, J. Defendant appealed. The District Court of Appeal, Rivkind, Leonard, Associate Judge, held that confronting defendant, who asserted his privilege against self-incrimination and had not waived that privilege, with videotape of robbery, was not "functional equivalent" of express questioning, requiring suppression of spontaneous and voluntary assertion made by defendant while being shown videotape of robbery.

Affirmed.

See also Fla.App., 508 So.2d 358.

**1. Criminal Law ⇐412.1(4)**

Confronting defendant, who asserted his privilege against self-incrimination, and had not waived that privilege, with videotape of robbery, was not "functional equivalent" of express questioning, requiring suppression of spontaneous and voluntary assertion made by defendant while being shown videotape of robbery.

**2. Criminal Law ⇐412.1(4)**

"Interrogation" within purview of *Miranda* is not restricted to express questioning.

See publication Words and Phrases for other judicial constructions and definitions.

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Richard L. Jorandby, Public Defender, and Margaret Good, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Jr., Atty. Gen., Tallahassee, and Michael W. Baker, Asst. Atty. Gen., West Palm Beach, for appellee.

RIVKIND, LEONARD, Associate Judge.

Appellant Robert Lee Lewis, appeals his conviction and sentence for attempted murder in the first degree, robbery with the use of a firearm, and shooting into an occupied building. Appellant contends that the trial court erred in failing to grant his motion to suppress incriminating statements made by him while in custody.

After appellant had been given *Miranda* warnings, he chose to remain silent but did not seek the assistance of counsel. He was not subject to express questioning. However, he was shown a video tape of the robbery. While being shown the tape, appellant made the statements: "Man, he took it like a man. I should have hit him a couple more times."

[1] Appellant argues that being confronted with the evidence is the "functional equivalent" of express questioning. We disagree. The conviction and sentence are affirmed.

A statement made by a person in response to custodial interrogation after he has exercised his right to remain silent is inadmissible unless he waives his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Here the appellant asserted that privilege. There was no waiver. Consequently, the admission is admissible only if it was not given in response to police interrogation.





[2] "Interrogation" within the purview of *Miranda* is not restricted to express questioning. The United States Supreme Court expanded the terms to include any conduct that is its functional equivalent.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 1690, 64 L.Ed.2d 297, 308 (1980) (footnotes omitted).

Most recently the United States Supreme Court has held that the suspect's perspective is extremely relevant in determining whether a certain police procedure constituted interrogation. *Arizona v. Mauro*, — U.S. —, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). The court used a case by case totality of the circumstances approach to determine whether the subject perceived that he was being coerced by a specific police procedure.

In the case at bar, it is unlikely that the appellant was compelled to incriminate himself by viewing a video of the robbery. He was no novice to the criminal justice system. He had a long and serious felony arrest record. He was familiar with police procedure and techniques. In addition, the testimony adduced at trial disclosed that he engaged in levity while watching the tape. His demeanor belies his contention that he was coerced by an "interrogation environment."

It may be that the police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response. However, the circumstances of this case support the conclusion that from the appellant's perspective such police procedure did not impinge upon his will in a coercive manner. His perspective detracts from the coerciveness of the interrogation environment. Appellant's response, therefore, was not in answer to interrogation but was a spontaneous and voluntary assertion. No constitutional error was committed by admission of his comments into evidence.

Affirmed.[1]

HERSEY, C.J., and GUNTHER, J., concur.

**Michael JOHNSON, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 85-2725.**

District Court of Appeal of Florida, Fourth District.

July 8, 1987.

Defendant was convicted in the Circuit Court, Broward County, Mark Speiser, J., of robbery and kidnapping. Defendant appealed. The District Court of Appeal, Stone, J., held that: (1) defendant's confinement of clerk of convenience store was sufficient to support conviction for kidnapping; (2) fact that robbery victim suffered emotional trauma not significantly different from that usually associated with components of crime was not clear and convincing reason to depart from sentencing guidelines; and (3) victim's age was not a valid consideration in departing from sentencing guidelines for robbery.

1. The appellant's second point on appeal, that the trial court exceeded the sentencing guidelines, is moot. On remand, the sentence was amended to conform to the guidelines.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

ROBERT LEE LEWIS

Appellant,

v.

CASE NO. 4-86-0913

STATE OF FLORIDA,

Appellee.

AUGUST 11, 1987

BY ORDER OF THE COURT:

ORDERED that the July 23, 1987 Motion filed by Appellant for Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

CLYDE L. HEATH,
CLERK.

cc: Margaret Good, Ass't. Public Defender
Marilyn Eisler, Ass't. Attorney General

cms



# Supreme Court of Florida

MONDAY, DECEMBER 14, 1987

ROBERT LEE LEWIS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 71,125
District Court of Appeal,
Fourth District No. 4-86-0913

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, C.J., OVERTON, EHRLICH, SHAW and GRIMES, JJ., concur
BARKETT and KOGAN, JJ., dissent

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

RECEIVED
DEC 16

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark A. Speiser, Judge

Margaret Good, Esquire
Marilyn Eisler, Esquire
John W. Tiedemann, Esquire

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

ROBERT LEE LEWIS

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ROBERT LEE LEWIS, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto an affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit of Florida
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

BY Margaret Good
Counsel for Petitioner

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

---

ROBERT LEE LEWIS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

---

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEE LEWIS, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

_____

_____

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. About, 400.A Month Year(1970)

_____

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [X]

b. Rent payments, interest or dividends? Yes [ ] No [X]

c. Pensions, annuities or life insurance payments? Yes [ ] No [•]

d. Gifts or inheritance? Yes [ ] No [•]

e. Any other sources? Yes [ ] No [•]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [•] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [•]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

Inbody

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Robert Lewis

Signature of Petitioner



STATE OF FLORIDA )

COUNTY OF _____ )

ROBERT LEE LEWIS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Robert Lewis

Signature of Petitioner

SUBSCRIBED and SWORN to before me this 21st day of January, 1988.

C. E. Lee

NOTARY PUBLIC

Notary Public, State of Florida
My Commission Expires Feb. 6, 1989

My Commission Expires:

**ORIGINAL**

No. 87-6422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

ROBERT LEE LEWIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

RESPONSE IN OPPOSITION
TO WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MARDI LEVEY COHEN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

## QUESTION PRESENTED

Whether pursuant to Rhode Island v. Innis, infra, and Arizona v. Mauro, infra, revealing evidence to a suspect which is available against that suspect amounts to an interrogation?



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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ROBERT LEE LEWIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

CITATION TO THE OPINION BELOW

The Respondent accepts the Petitioner's statement.

JURISDICTION

The Respondent accepts the Petitioner's initial statement, but rejects its final statement as conclusory.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement.

## STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case to the extent that it is a non-argumentative recitation of the facts and would make the following additons and/or clarifications:

Officer Curcio took Petitioner to an evidence room where he played a video tape depicting the robbery and the shooting of the victim. Officer Curcio at no time questioned the Petitioner, nor did he make any comments with regard to the video while Petitioner viewed it.

Petitioner viewed the video tape beside the police officer. He did not appear distressed, he was not badgered by questions or coercive comments in fact as the Florida Fourth District Court of Appeal noted he treated the situation rather haphazardly and with some levity. Additonally, the Court noted that Petitioner was well aware of his rights and the procedures involved as he had been arrested on felony charges many times previously. Here the court concluded that the circumstances of the case ie. Petitioner's knowledge of his rights and his obvious lack of fear and pressure supported the conclusion that from the Petitioner's perspective viewing the video did not "impinge upon his will in a coercive manner". 509 So.2d at 1237.

## REASONS FOR DENYING THE WRIT

Petitioner seeks to invoke this Court's discretionary jurisdiction to determine whether presenting evidence available against a suspect is an interrogation within the meaning of Rhode Island v. Innis, 446 U.S 291 (1980). Petitioner attempts to depict the decision of the Florida Fourth District Court of Appeal as a novel aproach which misapplies the holdings of Rhode Island v. Innis, supra, and Arizona v. Mauro, ___U.S.___, 107 S.Ct. 1931 (1987). Respondent submits that the Fourth District's application of these two decisions was correct and that the thorough, well-documented decision must stand.



In Rhode Island v. Innis, supra, this Honorable court was confronted with a factual scenario in which a custodial murder suspect, who had been given his Miranda v. Arizona, 384 U.S. 436 (1966) warnings and invoked his rights to counsel and silence in response thereto, incriminated himself by volunteering the location of the murder weapon after overhearing two police officers discuss the possibility that the shotgun would be found and discharged by schoolchildren. The Court held the defendant's inculpatory statement admissible, enunciating the legal principle that the officers' conversation did not constitute the "functional equivalent" of prohibited interrogation because they should not have been expected to know that their actions "were reasonably likely to elicit an incriminating response" from the particular suspect. Id., 446 U.S. 291, 301.

In Arizona v. Mauro, supra, this Court revisited Rhode Island v. Innis, focusing on the importance of the suspects perception. The Court held that a suspect's statement made after Miranda warnings were given and not a product of psychological pressure, compelling influences or direct questioning was not a result of interrogation or the functional equivalent and were admissible at trial. The Court employed a "totality of the circumstances approach" in reviewing the suspect's perception of the police procedure in question and relied on such factors as the suspect's understanding of the situation and whether the police questioned the suspect immediately prior to his statements.

In the instant case the Fourth District applied both of the holdings in Rhode Island v. Innis and Arizona v. Mauro. The Court paid particular attention to the circumstances of the case as espoused in the Arizona v. Mauro decision. The court stated that Petitioner had been given Miranda warnings and chose to remain silent. He was then shown a video tape of the robbery in the presence of a police officer and was "not subject to any express questioning". Further, Petitioner had an understanding of police procedure as he had been subject to many prior arrests. His demeanor while viewing the tape was one of

lightheartedness and levity and was contrary to his contention that he was subjected to an "interrogation environment". Again, the Court relied on Arizona v. Mauro which re-emphasized the importance of viewing the circumstances from the suspect's perspective. The Fourth District thus reviewed the facts, Petitioner's knowledge experience, and demeanor. The court, relying on the particular circumstances of the case, correctly determined that from Petitioner's perspective the police action involved did not rise to a level of interrogation, and his statement was a spontaneous and voluntary assertion which was correctly held admissible at trial.

Petitioner however wishes to dramatize the factual scenario in order to portray a scene which necessarily suggests an atmosphere of psychological pressure. Respondent asserts that no such psychological pressure or coercive questioning took place. In fact when the circumstances are evaluated without the drama the facts reveal that no questions were asked nor comments were made to Petitioner while he viewed the tape. Petitioner was under no great compulsion to speak, his statements were merely spontaneous and voluntary and not a product of psychological pressure or coercive questioning.

After a review of federal case law it appears that several courts have addressed the same issue as involved here, that is, whether revealing evidence available against a suspect to the suspect after he has invoked his right to remain silent cons itutes compulsion. In U.S. v. Davis, 527 F.2d 1110 (9th Cir. 1975) a defendant's confession was held admissible although made immediately after he indicated his wish to remain silent and made after F.B.I. agents asked defendant if he wished to reconsider his position, showing him a bank surveillance photo of himself participating in the robbery. See also U.S. v. Rodriquez-Gastellum, 569 F.2d 482 (9th Cir. 1978); U.S. v. Pheaster, 544 F.2d 353 (9th Cir. 1976) cert denied 429 U.S. 1099 (1977); U.S. v. Hodge 487 F.2d 945 (5th Cir. 1973). Additionally in Jenkins v. Bara, 663 F.Supp. 891 (E.D.N.Y. 1987), it was held



that a police officer's conduct in defendant's presence, of turning up the volume of a police radio broadcast and remarking about the broadcast which involved the defendant did not amount to an interrogation. Accordingly, federal courts have addressed this issue with similar facts as involved in the instant case and have upheld such police procedure under similar constitutional attacks.

Petitioner relies on several decisions of state courts to support his position that this type of police procedure is always coercive and always amounts to interrogation therefore rendering any statements or confessions inadmissible at trial. These decisions are certainly not binding on this Court. Additionally, the two federal decisions which Petitioner relies on were decided prior to the guidance of this Court's decisions in Rhode Island v. Innis and Arizona v. Mauro. Further, the Ninth Circuit in U.S. v. Barnes, 432 F.2d 89 (9th Cir. 1970) a case relied on by Petitioner, has since held contrary to Barnes in such cases are U.S. v. Rodriquez-Gastelum, supra, U.S. v. Davis, supra, and U.S. v. Pheaster, supra. Accordingly, pursuant to the dictates of Rhode Island v. Innis and Arizona v. Mauro the federal courts have decided that simply revealing evidence to the suspect, alone does not per se amount to interrogation.

In sum this Court has answered the issue presented here numerous times. The trial court and the Florida Fourth District Court of Appeal has decided this case in a manner consistent with this Court's prior decisions. No conflict among the decisions exists. Accordingly, this Court should not exercise its jurisdiciton.

## CONCLUSION

WEHEREFORE, based on the foregoing reasons and authorities, the State of Florida, Respondent, respectfully requests that the Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 87-6422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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ROBERT LEE LEWIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal, Fourth District of Florida has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this 21st day of April, 1988.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

## ROBERT LEE LEWIS *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

No. 87-6422. Decided May 31, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner was convicted of robbery and attempted first-degree murder, charges that stemmed from the robbery of a gas-station attendant. At trial, he sought to suppress statements he had made while in custody, claiming that his *Miranda* rights were violated. The pertinent facts are that petitioner, once in custody, was given *Miranda* warnings and immediately invoked his right to remain silent. The police did not try to question him, but instead took him to a room where he was shown a videotape of the robbery, which also included footage of the shooting of the attendant. While viewing the videotape, petitioner made several incriminating statements to an officer. The state trial court denied petitioner's motion to suppress the statements, and its decision was affirmed on appeal. Petitioner argued that being confronted with evidence of this nature is the "functional equivalent" of express questioning, which is impermissible once a person in custody has invoked his right to remain silent, but the Florida Court of Appeals disagreed.

We have stated that "interrogation" under *Miranda* does include conditions that are its "functional equivalent," that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980). We also have observed that a "psychological ploy" of any significance would also be

treated as the "functional equivalent" of interrogation. *Arizona* v. *Mauro*, 107 S. Ct. 1931, 1935 (1987).

Whether police may confront a suspect with evidence against him, outside the range of normal arrest and charging procedures, without engaging in the "functional equivalent" of interrogation is a substantial question in light of *Innis*. In addition, the federal and state courts disagree over the issue. Some courts, for example, have found an interrogation to have occurred when the police, in booking a suspect, merely advised him of the charges and then described the evidence against him in some detail. *Wainwright* v. *State*, 504 A. 2d 1096, 1102–1103 (Del. 1986); *Koza* v. *State*, 718 P. 2d 671, 673–676 (Nev. 1986); *State* v. *Quinn*, 498 A. 2d 676, 677–679 (Md. 1985). Other courts have held to the contrary. *United States* v. *Pheaster*, 544 F. 2d 353, 366–368 (CA9 1976); *United States* v. *Hodge*, 487 F. 2d 945, 946–947 (CA5 1973). On the other side of the issue, moreover, some courts have refused to treat much more adventurous police practices, which are in no sense any part of the formal arrest or charging procedures, as the "functional equivalent" of interrogation. In *People* v. *Ferro*, 472 N. E. 2d 13 (N. Y. 1984), for example, no *Miranda* violation was found where the police took furs allegedly stolen by the suspect and spread them out, without a word, in front of the suspect's cell for him to ponder. See also *Bryant* v. *State*, 431 A. 2d 714 (Md. App.), cert. denied, 456 U. S. 949 (1982). I would grant certiorari to consider the construction of *Innis* rendered by the court below and to resolve the significant disagreement on this general issue among the state and federal courts, which has led those courts both to handicap the police in pursuing some apparently legitimate law-enforcement practices and to approve the use of other ploys that have nothing to do with the usual and accepted procedures for arresting and charging a suspect.